

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
5/13/2019 3:52 PM  
BY SUSAN L. CARLSON  
CLERK

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
5/21/2019  
BY SUSAN L. CARLSON  
CLERK

No. 96527-7

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

---

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; ROSARIO CRISOSTOMO FLORES, an individual; and PATRICIA CRISOSTOMO FLORES, a minor child by and through LUCINA FLORES, her natural mother and default guardian,  
Petitioners,

v.

INLAND WASHINGTON, LLC, a Washington limited liability company,  
Respondent,

and

INLAND GROUP P.S., LLC, a Washington limited liability company, RALPH'S CONCRETE PUMPING, INC., a Washington corporation, and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation;

Defendants

---

**AMICUS CURIAE BRIEF BY PACIFIC NORTHWEST  
REGIONAL COUNCIL OF CARPENTERS (PNWRCC)**

---

Joshua Stellmon, WSBA No. 45984  
Matthew E. Malmsheimer, OSB No. 33847,  
Pending admission *pro hac vice*  
Haglund Kelley LLP  
200 SW Market St. Ste. 1777  
Portland OR, 97201  
(503) 225-0777  
[jstellmon@hk-law.com](mailto:jstellmon@hk-law.com);  
[mmalmsheimer@hk-law.com](mailto:mmalmsheimer@hk-law.com)

## TABLE OF CONTENTS

<b>I.</b>	<b>INTRODUCTION .....</b>	<b>1</b>
<b>II.</b>	<b>IDENTITY AND INTEREST OF AMICUS CURIAE .....</b>	<b>3</b>
<b>III.</b>	<b>STATEMENT OF THE CASE .....</b>	<b>6</b>
<b>IV.</b>	<b>ARGUMENT .....</b>	<b>8</b>
	I. This Court has granted review of both the underlying merits of the case and the Court of Appeals decision that review was improvidently granted. ....	8
	II. Summary judgment should not have been granted to Inland; there are genuine issues of material fact precluding summary judgment on the Vargas’s claims and Inland was not entitled to judgment as a matter of law. ....	12
	III. Inland misconstrues the definition of “common work areas.” Vargas was working in a common work area. ....	14
	IV. Policy considerations heavily favor holding Inland directly liable for breach of its own duty to ensure a safe workplace and vicariously liable for the failure of subcontractors to provide a safe workplace. ....	17
<b>V.</b>	<b>CONCLUSION .....</b>	<b>19</b>
<b>VI.</b>	<b>APPENDIX .....</b>	<b>21</b>

## **TABLE OF AUTHORITIES**

	<b>Page(s)</b>
 <b><u>Cases</u></b>	
<i>Afoa v. Port of Seattle</i> , 176 Wn.2d 460, 296 P.3d 800 (2013).....	<i>passim</i>
<i>Afoa v. Port of Seattle</i> , 191 Wn.2d 110, 421 P.3d 903 (2018).....	<i>passim</i>
<i>Bozung v. Condo. Builders, Inc.</i> , 42 Wn. App. 442, 711 P.2d 1090 (1985).....	16
<i>City of Sequim v. Malkasian</i> , 157 Wash.2d 251, 138 P.3d 943 (2006).....	12
<i>Kamla v. Space Needle, Corp.</i> , 147 Wn.2d 114, 52 P.3d 472 (2002).....	17
<i>Kelley v. Howard S. Wright Const. Co.</i> , 90 Wn.2d 323, 582 P.2d 500 (1978).....	<i>passim</i>
<i>Millican v. N.A. Degerstrom, Inc.</i> , 177 Wn. App. 881, 313 P.3d 1215 (Div. 3, 2013) review denied, 179 Wn.2d 1026, 320 P.3d 718 (2014).....	<i>passim</i>
<i>Stute v. P.B.M.C. Inc.</i> , 114 Wn.2d 454, 788 P.2d 545 (1990).....	<i>passim</i>
<i>Weinert v. Bronco Nat. Co.</i> , 58 Wn. App. 692, 795 P.2d 1167 (1990).....	15
 <b><u>Statutes</u></b>	
Occupational Safety and Health Act of 1970 .....	5
Public Law 91-596, 84 Stat. 1590.....	5
RCW 49.17.010 .....	5

### **Other Authorities**

RAP 1.2(a) .....	10
RAP 18.8 .....	10
WAC 296-155-110.....	8
WAC 296-155-682.....	7
WAC 296-800-130.....	8
WAC 296-800-140.....	8
WAC 296-800-13020.....	8
WAC 296-800-13025.....	8
WAC 296-800-14005.....	8
WAC 296-800-14025.....	8
WAC 296-800 <i>et seq.</i> .....	4

### **Secondary Sources**

Ben Moore, <i>A Stute Observation: Re-Examining Washington's Enforcement of Workplace Safety Regulations</i> , 93 Wash. L. Rev. 1533, 1550 (2018).....	11
--	----

## I. INTRODUCTION.

For the protection of the members of the Pacific Northwest Regional Council of Carpenters (“PNWRCC”) and all construction workers throughout the state of Washington, it is critical that general contractors continue to be vicariously liable for their subcontractors’ negligence and WISHA violations. Washington’s concurrent, non-delegable duty of care is effectively eliminated if liability is several and can be apportioned. Such a rule of law would reward general contractors for shirking their oversight role and hiring subcontractors regardless of their safety record by eliminating the incentive created by the general contractors’ retention of control – and liability – for jobsite safety. Joint and several liability must survive when a nondelegable duty is owed and vicarious liability exists. This Court should reaffirm decades of pro-worker safety law by affirming *Stute* and *Millican*.

Washington has historically been a leader when it comes to workplace safety. In the context of construction, this has been in large part due to worker-friendly safety laws and their appropriately broad interpretation by Washington courts to effectuate their purpose: putting worker safety ahead of corporate profits. *Stute*, *Kelley* and *Millican* stand as bulwarks for construction workers to help ensure that they can go home to their families without the loss of life or limb after a hard day’s work. Over

the last three decades Washington law has become more resolute: general contractors must control their worksite and actively promote workplace safety – or face the consequences.<sup>1</sup>

In tort law, liability follows from a duty and a breach of that duty. A general contractor's duty is to provide another layer of expertise and safety while coordinating work on a jobsite. This duty is nondelegable; even if a general contractor delegates this duty and responsibility, it will still be held vicariously liable for safety violations. General contractors also have *per se* control of their job sites, as they should. Under *Stute*, general contractors must have control of their jobsites.<sup>2</sup> This law is clear and straight forward, and it must remain so for Washington to continue protecting the men and women who work tirelessly to build, maintain, and operate the infrastructure of society.

Under current Washington common law, Inland should not have been dismissed on summary judgment. Comparative fault and the breach of a duty are questions of fact that are for the jury to determine. Inland admitted that it owed nondelegable duties as it is was a general contractor. Breach

---

<sup>1</sup> See *Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978); *Stute v. P.B.M.C. Inc.*, 114 Wn.2d 454, 788 P.2d 545 (1990); *Millican v. N.A. Degerstrom, Inc.*, 177 Wn. App. 881, 313 P.3d 1215 (Div. 3, 2013) *review denied*, 179 Wn.2d 1026, 320 P.3d 718 (2014).

<sup>2</sup> *Stute* at 462, 788 P.2d at 549. "Since as a practical matter, the general contractor must have control over the property and working conditions, the general contractor will have the duty to provide for safety."

and allocation of comparative fault should therefore be determined by a jury. No general contractor should ever be dismissed on summary judgment in a *Stute* case if material facts exist and support the finding of a worksite safety violation. In the 29 years since this Court's *en banc Stute* decision, no appellate court has published the affirmation of a dismissal of a general contractor on summary judgment in a construction injury case. General contractors cannot be permitted to avoid liability by avoiding control. Their control is *per se*, and like a general contractor's duty to ensure a safe worksite, it is nondelegable.<sup>3</sup>

## **II. IDENTITY AND INTEREST OF AMICUS CURIAE.**

The PNWRCC is the pacific northwest branch of The United Brotherhood of Carpenters ("UBC"), formed in 1881 through grass-root efforts to unite carpenters to stand together for the common goal of improving working conditions. The UBC is one of the largest trade unions in the United States, with nearly 500,000 members in the construction and wood-products industries nationwide. The PNWRCC represents over 28,000 carpenters and related construction craft workers in six different states: Alaska, Idaho, Montana, Oregon, Washington and Wyoming. The

---

<sup>3</sup> *Stute v. P.B.M.C. Inc.*, 114 Wn.2d 454, 463, 788 P.2d 545 (1990).

PNWRCC members build the most important infrastructure, commercial buildings, housing and machines at the core of the American economy.

The PNWRCC and its members are enormously interested in keeping worker safety at the forefront of the Washington legislature and jurists' attention in order to effectuate its goal of building a brighter, safer future. Construction worksites are naturally dangerous, which is why Washington requires additional protections on top of the regular duty of employers and general contractors to provide safe and healthy workplaces free from recognized hazards.<sup>4</sup>

Washington is currently one of the safest states for workers in the nation.<sup>5</sup> In 1990, The UBC is one of the largest trade unions in the United States. the number of fatal occupational injuries in construction, manufacturing, trade, transportation, utilities, professional and business services per 100,000 workers (3-year average) was: Washington - 9.9; Oregon - 14.4; Idaho - 17.5; Montana - 23.7; Wyoming - 37.9; and Alaska - 22.3.<sup>6</sup> By 2000, those numbers decreased to: Washington - 4.1; Oregon - 4.9; Idaho - 8.7; Montana - 15.5; Wyoming - 13.5; and Alaska: - 13.3.<sup>7</sup> As

---

<sup>4</sup> WAC 296-800 et seq.

<sup>5</sup> *U.S. Bureau of Labor Statistics, Census of Fatal Occupational Injuries; U.S. Bureau of Economic Analysis, Occupational Fatalities in 2018* (accessed May 2, 2019) (attached as Appendix A),

<https://www.america'shealthrankings.org/explore/annual/measure/WorkFatalities/state/AL>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*



of 2018, these numbers are: Washington - 2.7; Oregon - 3.4; Idaho - 4.8; Montana - 6.4; Wyoming - 12.5; and Alaska - 9.9.<sup>8</sup>

As the foregoing figures show, Washington is the safest State within the PNWRCC's jurisdiction. Washington is currently tied 2<sup>nd</sup> for the fewest occupational fatalities among all U.S. states, right behind New York at 2.5 deaths per 100,000. Wyoming ranks 50<sup>th</sup>, followed by Alaska at 49<sup>th</sup>, and Mississippi at 48<sup>th</sup>. Some of the decreases in workplace fatalities can be attributed to technological intervention, but these technologies are often applied equally across the states. Although OSHA was first promulgated in 1971, and WISHA in 1973<sup>9</sup>, it is not a coincidence that Washington is currently one of the leaders in the nation when it comes to workplace safety. The PNWRCC and its members want Washington to stay that way. Many improvements can be directly tied to workplace safety laws created by the legislature, interpreted by the judiciary and enforced by executive agencies.

The most recent data for Washington State reveals that the private construction industry sector had the highest number of fatalities of any

---

<sup>8</sup> *Id.*

<sup>9</sup> See RCW 49.17.010. "The legislature finds that personal injuries and illnesses arising out of conditions of employment impose a substantial burden upon employers and employees. . . . Therefore, in the public interest for the welfare of the people of the state of Washington and in order to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington, the legislature . . . declares its purpose . . . to create, maintain, continue, and enhance the industrial safety and health program of the state, which program shall equal or exceed the standards prescribed by the Occupational Safety and Health Act of 1970 (Public Law 91-596, 84 Stat. 1590)."

industry, with 15 fatalities (10 of which were from falls, slips and trips).<sup>10</sup> Nationwide, construction work is one of the most dangerous occupations resulting in some of the highest numbers of fatal work injuries (971 deaths in 2017).<sup>11</sup> Fatal falls are currently at their highest level in the 26-year history of the Census of Fatal Occupational Injuries (“CFOI”) – a total of 887 worker deaths (17 percent of all fatal occupational deaths).<sup>12</sup>

If Washington allows general contractors to avoid vicarious liability by delegating their control, made possible by the creation of “concurrent nondelegable duties” which prevents joint and several liability, Washington construction sites will become less safe and the average number of construction injuries and fatalities will increase. The PNWRCC strongly supports *Stute*, *Kelley*, and *Millican*’s per se control, nondelegable duties, and vicarious liability of general contractors for their subcontractors’ negligence.

### **III. STATEMENT OF THE CASE.**

Appellant Gildardo Vargas’s head was smashed by the end of a pressurized hose during a concrete pour while working for Hilltop Concrete

---

<sup>10</sup> *Fatal Work Injuries in Washington – 2017*, U.S. Bureau of Labor Statistics, U.S. Department of Labor (March 6, 2019) (attached as Appendix B), available at [https://www.bls.gov/regions/west/news-release/fatalworkinjuries\\_washington.htm](https://www.bls.gov/regions/west/news-release/fatalworkinjuries_washington.htm).

<sup>11</sup> *National Census of Fatal Occupational Injuries in 2017*, U.S. Bureau of Labor Statistics, U.S. Department of Labor (December 18, 2018, 10:00 AM (EST))(attached as Appendix C), available at <https://www.bls.gov/news.release/pdf/cfoi.pdf>.

<sup>12</sup> *Id.*

Construction, Inc., and while Respondent Inland Washington, LLC (“Inland”) was the undisputed general contractor on the jobsite.<sup>13</sup> Mr. Vargas suffered a traumatic brain injury after the hose struck his head, an incident that occurred due to violations of several WISHA provisions.<sup>14</sup>

Inland employees were on the site and involved with the decision of when and where to pump concrete at the time of the injury.<sup>15</sup> In addition to Hilltop, other subcontractors were working on and around the work area where the injury occurred, including defendant Ralph’s Concrete Pumping, Inc. and defendant Miles Sand and Gravel Co. d/b/a Concrete Nor’west.<sup>16</sup> There is ample evidence that Inland and its subcontractors violated WISHA. Inland failed to follow the pump truck manufacturer’s manual when operating the concrete pump<sup>17</sup> when it allowed workers within the danger zone as the pumping started.<sup>18</sup> There is also evidence that there was a lack of instruction, training, and safety prevention programs designed to keep

---

<sup>13</sup> CP 1980-1981, 1987-1988 (Deposition of Tim Henson, pages 24-25 and 98-99); CP 2455-2458 (Order Granting Plaintiffs’ Motion for Partial Summary Judgment); CP 1989-1900 (Accident Investigation Report of Matt Skoog); CP 2001-2012 (Deposition of Gordon Skoog, pages 53-64); CP 2055, 2066-2067 (Deposition of Steve Miller, page 37:2, 60-61).

<sup>14</sup> CP 1989, 2063, 2157.

<sup>15</sup> CP 1902.

<sup>16</sup> CP 1908-1912, CP 2052, 2095, 2157.

<sup>17</sup> WAC 296-155-682(8)(c)(iii)(F)-(G).

<sup>18</sup> CP 1923, 1964, 1966.

workers away from the concrete hose when it first started pumping concrete.<sup>19</sup>

#### IV. ARGUMENT.

I. **This Court has granted review of both the underlying merits of the case and the Court of Appeals decision that review was improvidently granted.**

Inland and the Building Industry Association argue that this court should dismiss due to lack of extraordinary circumstances, stating.<sup>20</sup>

The limited issue under review by the Court is whether Division I erred in reversing its decision to grant discretionary review and in remanding the case to superior court.<sup>21</sup>

This is not accurate. On March 13, 2019, this Court Ordered that it granted review of both

the Court of Appeals decision that review was improvidently granted *and* the issues regarding the underlying merits of the case as raised in the motion for discretionary review filed at the Supreme Court by the Petitioners.<sup>22</sup>

---

<sup>19</sup> See WAC 296-155-110, WAC 296-800-140, WAC 296-800-14005, and WAC 296-800-14025, WAC 296-800-130, WAC 296-800-13020, and WAC 296-800-13025.

<sup>20</sup> Supplemental Brief of Respondent, page 1-4; Building Industry Association of Washington Amicus Brief, page 7-10.

<sup>21</sup> *Id.* at 8.

<sup>22</sup> Order Clarifying Scope of Review, Chief Justice Mary E. Fairhurst, March 13, 2019 (emphasis added).

This clear, unambiguous and concise Order clarifying the scope of review should end the matter of what issues are to be decided by this Court.

On July 21, 2017, the Division I Court of Appeals Ordered that discretionary review was granted of: 1.) the order granting Inland's summary judgment motion; 2.) the denial of reconsideration in case No. 76717-9-I; and 3.) the order denying summary judgment in case No. 76893-0-I.<sup>23</sup> On September 17, 2018, Division One filed an unpublished opinion indicating that "[i]n light of the Supreme Court's decision in *Afoa v. Port of Seattle*, which reversed this court's decision in *Afoa v. Port of Seattle* . . . we deem review improvidently granted."<sup>24</sup>

This Court has undertaken review of both 1.) the Division One Court of Appeals denial of review and 2.) the merits raised in Vargas's petition for discretionary review. The merits include decisions regarding the duties of general contractors and the granting of the general contractor Inland's motion for summary judgment.<sup>25</sup>

---

<sup>23</sup> Ruling Granting Discretionary Review, Court of Appeals of the State of Washington Division One, page 12 (July 21, 2017).

<sup>24</sup> Unpublished Opinion, Court of Appeals of the State of Washington Division One, page 1-2 (September 17, 2018) (citations omitted).

<sup>25</sup> Petitioners' Motion for Discretionary Review, No. 76717-8-I.

This Court should review these issues immediately to prevent additional conflicting decisions between the Court of Appeals and because the case involves fundamental and urgent issues of broad public importance which requires prompt and ultimate determination. The RAPs are to be liberally interpreted to promote justice and facilitate decisions based on a cases merit.<sup>26</sup> Even RAP 18.8(b) includes an explicit timing exception when extraordinary circumstances exist and when the extension of a deadline will prevent a gross miscarriage of justice.<sup>27</sup>

Inland discusses RAP 18.8(b), but timing is not an issue because the final summary judgment dismissal of Inland's claims was timely appealed and Division One's reversal of its acceptance of review was also timely appealed. Timeliness is not an issue under RAP 18.8, but if and to the extent RAP 18.8 is found to apply, this case would meet the criteria of extraordinarily circumstances for the reasons set forth in appellant Vargas' brief.

When it comes to general contractors seeking summary judgment in superior court, there is currently a significant risk that

---

<sup>26</sup> RAP 1.2(a) "These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b)."

<sup>27</sup> RAP 18.8(b).

the judge mistakenly applies *Afoa II* and dismisses the general contractor, believing that a general contractor's lack of oversight and control over its worksite means it escapes liability.<sup>28</sup> Importantly, *Afoa II* was a landowner case and in no way overruled *Stute*, *Kelley*, or *Millican*. That distinction can readily be lost, even by careful judges, a danger that is only heightened by a General Contractor who seeks to take advantage of the confusion caused by *Afoa II* to avoid the consequence of poor oversight of their jobsites.

This confusion is even apparent at the appellate level in this case, where discretionary review was granted, and then withdrawn – with the sole explanation being that withdrawal was necessary “in light of *Afoa II*.” Extraordinary circumstances certainly exist where this Court has the immediate opportunity to clarify the law surrounding general contractor liability as opposed to multiemployer workplace / landowner liability. There is a significant risk that the numbers of unsafe jobsites and practices will continue to expand as general contractors are erroneously dismissed from *Stute* cases unless this Court quickly clarifies and limits its holding in *Afoa II*. Review should not be limited, and if it is, it

---

<sup>28</sup> See Ben Moore, *A Stute Observation: Re-Examining Washington's Enforcement of Workplace Safety Regulations*, 93 Wash. L. Rev. 1533, 1550 (2018) (attached as Appendix D).

should be limited to the scope as outlined in this Court's Order Clarifying Scope of Review.

II. Summary judgment should not have been granted to Inland; there are genuine issues of material fact precluding summary judgment on the Vargas's claims and Inland was not entitled to judgment as a matter of law.

Summary judgment motions are reviewed de novo, with the Court engaging in the same inquiry as the trial court.<sup>29</sup> *Stute* held a “general contractor’s supervisory authority is *per se* control over the workplace, and the [non-delegable duties are] placed upon the general contractor as a matter of law.”<sup>30</sup> Under *Stute*, the *prime responsibility* for the safety of *all* workers on the site rests upon general contractors.<sup>31</sup> That is justified by the general contractor’s “innate supervisory authority,” which “constitutes sufficient control over the workplace” to warrant the general contractor bearing the primary responsibility for compliance with safety regulations.<sup>32</sup>

This Court in *Afoa II* confirmed that general contractors always have a duty to comply with WISHA regulations.<sup>33</sup> Under

---

<sup>29</sup> *City of Sequim v. Malkasian*, 157 Wash.2d 251, 261, 138 P.3d 943 (2006).

<sup>30</sup> *Stute v. P.B.M.C. Inc.*, 114 Wn.2d 454, 463-464, 788 P.2d 545 (1990).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Afoa v. Port of Seattle*, 191 Wn.2d 110, 140, 421 P.3d 903, 918 (2018). “The *Afoa I* decision confirmed that a jobsite owner, such as the Port, is not *per se* liable for all WISHA violations at the work site. Whereas general contractors **always** have a duty to



*Afoa I*, this Court made it clear that general contractors had *per se* control, as opposed to jobsite owners where control had to be proven:

[A] jobsite owner who exercises pervasive control over a work site should keep that work site safe for all workers, **just as a general contractor is required to keep a construction site safe under *Kelley***, and just as a master is required to provide a safe workplace for its servants at common law.<sup>34</sup>

An analysis of the extent of control retained by a general contractor over its jobsite is irrelevant to its liability: its control is *per se*, its duty is nondelegable and its liability is vicarious. Washington residents want general contractors to remain liable for what happens on jobsites so that general contractors prioritize safety above all else. General contractors are professional builders, and they should be required to use their supervising and coordinating authority to keep jobsites safe. The retained control doctrine is subordinate – it only applies in the context of a defendant landowner and has no application to general contractors.

Under the evidence produced by Vargas, viewed in the light most favorable to him, Inland did retain control of the workplace.

---

comply with WISHA regulations, “jobsite owners have a duty to comply with WISHA only if they retain control over the manner in which contractors complete their work.” (Citations omitted; emphasis added).

<sup>34</sup> *Afoa v. Port of Seattle*, 176 Wn.2d 460, 481, 296 P.3d 800, 812 (2013).

Regardless, Inland retained a *per se* a duty to keep the workplace safe. Thus, summary judgment dismissing Vargas's claim against Inland was inappropriate.

**III. Inland misconstrues the definition of “common work areas.” Vargas was working in a common work area.**

Inland misleadingly argues that the area where Vargas was working at the time of his injury was a non-common work area and tries to narrowly define “common work areas.”<sup>35</sup> The Court in *Kelley* adopted the Michigan Supreme Court’s legal framework for general contractor liability from *Funk v. General Motors Corp.*:

Placing ultimate responsibility on the general contractor for job safety in common work areas will, from a practical, economic standpoint, render it more likely that the various subcontractors being supervised by the general contractor will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas.<sup>36</sup>

This language from *Kelley*, by itself, refutes Inland’s assertions that where a general contractor hires a subcontractor to work within a designated area where no other subcontractors are present at a particular time, that designated area is not a common work area. The general contractor must

---

<sup>35</sup> Supplemental Brief of Respondent, page 8. “But extending the Kelley rule to non-common work areas – as the plaintiffs (and apparently L&I) wish to do here – is extremely dangerous.”

<sup>36</sup> *Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 331, 582 P.2d 500, 505 (1978).

itself implement or supervise safety precautions within areas that are to be used by multiple subcontractors. Washington also has caselaw that favors discarding the common work area requirement due to general contractors' pervasive and complete authority over their jobsites.<sup>37</sup> In *Weinert v. Bronco Nat. Co.*, the court found that there was no evidence to support a finding that the place where the plaintiff's fall occurred was a "common area,"<sup>38</sup> but summary judgment dismissing the defendant general contractor (and also the mid-tier contractor) was reversed.<sup>39</sup>

Someone must oversee the entire jobsite where construction is taking place – fairness and efficiency both dictate that general contractors have responsibility over the entire area. The definition of "common work areas" is simply areas where the employees of two or more subcontractors eventually work. The question is not whether workers of more than one subcontractor were working in an area at the exact time of the incident, but whether one or more subcontractors will *eventually* be working in the area where the incident occurred. A common work area is potentially more

---

<sup>37</sup> See, *Weinert v. Bronco Nat. Co.*, 58 Wn. App. 692, 693-696, 795 P.2d 1167, 1168-1170 (1990). "Nor is there any evidence to support a finding that the place of Weinert's fall was a 'common area' . . . The purpose of the statutes and regulations relied upon in *Stute* is to protect workers. The basis for imposing the duty to enforce those laws on a general contractor exists with respect to an owner/developer who, like the general contractor, has the same innate overall supervisory authority and is in the best position to enforce compliance with safety regulations."

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 697, 795 P.2d at 1170.

dangerous than the rest of the jobsite because as subcontractors, trades and employees come and go, there is the potential that none of them will claim the area as their own and take responsibility for it because their work in a particular area is transitory and overlaps with other subcontractors. While the various trades on a common work area can come and go, the general contractor is uniquely positioned to ensure that the worksite hygiene is properly maintained, equipment is properly handled, and safety precautions are followed.

This Court should overrule *Bozung* to the extent that the court found that the location of the incident was not a common work area because the subcontractor was the only active contractor on the site at the time of the incident.<sup>40</sup> This improper reading and application of *Kelley* and *Funk* are perpetuated by general contractors on a regular basis and fuel arguments like Inland's that subcontractors need to occupy by the same space at the same time in order for an area to be considered "common." This was not how the *Stute*, *Kelley*, nor *Funk* cases defined this term decades ago. This Court should confirm the definition of a "common work area" as an area where two or more subcontractors will eventually work.

---

<sup>40</sup> *Bozung v. Condo. Builders, Inc.*, 42 Wn. App. 442, 447, 711 P.2d 1090, 1093 (1985) (citing *Kelley*, 90 Wash.2d at 331, 582 P.2d 500; *Funk*, 392 Mich. at 104, 220 N.W.2d 641).

IV. Policy considerations heavily favor holding Inland vicariously liable for the failure of its subcontractors to provide a safe workplace.

Inland had a long-standing common law duty to provide a safe workplace for Vargas, the breach of which Inland is directly liable for.<sup>41</sup> Inland is also vicariously liable for Hilltop's breach of duties and WISHA violations.<sup>42</sup> There is no requirement or basis in Washington law for there to be a retained control analysis or jury finding that Inland controlled Hilltop because Inland is a general contractor, not a landowner.<sup>43</sup> Even if it were required, the test would easily be satisfied, and the test would be whether Inland had the right to exercise control over the work of the subcontractor, not whether there was actual interference or control.<sup>44</sup>

It is not difficult to imagine the dystopian future where general contractors in Washington are able to avoid liability by avoiding control. Rather than walk the jobsite, ensure good jobsite hygiene and ensure that subcontractors and their workers comply with personal protective equipment and safety regulations, general

---

<sup>41</sup> *Afoa v. Port of Seattle*, 191 Wn.2d 110, 124–25, 421 P.3d 903, 911 (2018); *Millican v. N.A. Degerstrom, Inc.*, 177 Wash. App. 881, 893, 313 P.3d 1215 (2013).

<sup>42</sup> *Id.*

<sup>43</sup> See *Kamla v. Space Needle, Corp.*, 147 Wn.2d 114, 52 P.3d 472 (2002); *Afoa v. Port of Seattle*, 176 Wn.2d 460, 296 P.3d 800 (2013).

<sup>44</sup> *Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 330–331, 582 P.2d 500, 505 (1978); *Kamla v. Space Needle, Corp.*, 147 Wn.2d 114, 121, 52 P.3d 472 (2002).

contractors will have every incentive to hide in their job shacks and refuse to walk the jobsite in order to ensure that there are no facts supporting actual or constructive control over their own jobsites.

If general contractors can avoid liability by avoiding control, general contractors will lose an important incentive to hire diligent, safe subcontractors. Perversely, the less control exercised over the subcontractors, the better, because that will evidence a lack of control, insulating and protecting the general contractor from liability. Profit focused general contractors will maximize profits by spending less time on the jobsite and less time ensuring workplace safety.

Even when all safety rules and practices are followed, construction work is a dangerous profession, and Washington's construction workers routinely face significant risk of injury (and death) in order to build the State of Washington and support their families. If the Court were to eliminate per se control and joint and several liability for general contractors, the negative impact for construction workers would be potentially devastating. It would also undermine the effectiveness of the workplace safety laws enacted by the legislature and would encourage general contractors to put profits before safety.

The PNWRCC does not want Washington to undo three decades of pro-worker safety law by failing to affirm *Stute* and *Millican* now, while the repercussions of confusing *Afoa II* dicta are ripe and being argued before the Court. The nondelegable duties owed by general contractors and the vicarious liability that follows best protects worker safety because they “place the safety burden on the entity in the best position to ensure a safe working environment”<sup>45</sup> – the general contractor.

## V. CONCLUSION.

The *Afoa II* majority did not cite, reference or overrule *Stute*. *Afoa II*'s holding is limited to its facts – landowner cases where there is no general contractor, and where control must be proven to see if a particular landowner exercised control sufficient to be deemed the equivalent of a general contractor. The PNWRCC and its members implore this Court to provide much-needed clarification on the topic of general contractor liability. For the sake of all Washington construction workers, the PNWRCC respectfully requests that this Court affirm *Stute*, *Kelley*, and *Millican* by holding that general contractors have *per se* control of their jobsites and that their nondelegable duties create vicarious liability for any

---

<sup>45</sup> *Afoa I*, 176 Wash.2d at 479, 296 P.3d 800.

their subcontractors' breaches of duty and WISHA and safety violations. Putting profits ahead of worker safety, Inland and the Building Industry Association hope to eviscerate Washington workplace safety law by minimizing liability for general contractors for workers injured on *their* jobsites. Not only are the general's uniquely positioned to prevent injury and death, they also profit significantly from the labor of the subcontractors' workers. Their corresponding duty should not be eliminated. Maintaining the *status quo* and further refining Washington's extensive workplace safety laws to keep our construction workers safe is the only path forward for Washington.

Respectfully submitted this 13<sup>th</sup> day of May, 2019.

/s/ Joshua Stellmon

Joshua Stellmon, WSBA No. 45984

Matthew E. Malmsheimer, OSB No. 33847,

Pending admission *pro hac vice*

Haglund Kelley LLP

200 Market St. Ste. 1777

Portland OR, 97201

(503) 225-0777

jstellmon@hk-law.com;

mmalmsheimer@hk-law.com



## VI. APPENDIX

- A. U.S. Bureau of Labor Statistics, Census of Fatal Occupational Injuries; U.S. Bureau of Economic Analysis, Occupational Fatalities in 2018 <https://www.america'shealthrankings.org/explore/annual/measure/WorkFatalities/state/ALL> (last visited May 7, 2019).
- B. *Fatal Work Injuries in Washington – 2017*, U.S. Bureau of Labor Statistics, U.S. Department of Labor (March 6, 2019), available at [https://www.bls.gov/regions/west/news-release/fatalworkinjuries\\_washington.htm](https://www.bls.gov/regions/west/news-release/fatalworkinjuries_washington.htm) (last visited May 7, 2019).
- C. *National Census of Fatal Occupational Injuries in 2017*, U.S. Bureau of Labor Statistics, U.S. Department of Labor (December 18, 2018, 10:00 AM (EST)), available at <https://www.bls.gov/news.release/pdf/cfoi.pdf> (last visited May 7, 2019).
- D. Ben Moore, *A Stute Observation: Re-Examining Washington's Enforcement of Workplace Safety Regulations*, 93 Wash. L. Rev. 1533, 1550 (2018).

### **DECLARATION OF SERVICE**

I, Anna Todd, hereby declare under penalty of perjury under the laws of the State of Washington that on May 13, 2019, I caused the foregoing Brief of Amicus Curiae PACIFIC NORTHWEST REGIONAL COUNCIL OF CARPENTERS (PNWRCC) to be electronically filed with the Washington State Supreme Court, which will provide notification of such filing to all parties in this matter.

SIGNED this 13<sup>th</sup> day of May, 2019, at Portland, OR.

/s/ Anna Todd

Anna Todd  
Secretary

## **APPENDIX A**

# Occupational Fatalities

**U.S. Value:** 4.4

**Healthiest State:** New York: 2.5

**Least-healthy State:** Wyoming: 12.5

**Definition:** Number of fatal occupational injuries in construction, manufacturing, trade, transportation, utilities and professional and business services per 100,000 workers (3-year average)

**Data Source & Year(s):** U.S. Bureau of Labor Statistics, Census of Fatal Occupational Injuries; U.S. Bureau of Economic Analysis, 2014-2016

**Suggested Citation:** America's Health Rankings analysis of U.S. Bureau of Labor Statistics, Census of Fatal Occupational Injuries; U.S. Bureau of Economic Analysis, United Health Foundation, America'sHealthRankings.org. Accessed 2019.

## WHY DOES THIS MATTER?

Occupational fatalities represent unsafe working conditions and personal risk faced by **workers**. In 2016, there were **5,190** fatal workplace injuries — the highest number since 2008. Transportation incidents accounted for **40.1 percent** of all fatalities, followed by violence and other injury by person or animal which accounted for **16.7 percent** of fatalities. There were **2.9 million** nonfatal occupational illnesses and injuries reported by private employers in the United States in 2017.

Occupational work injury and deaths are costly. In 2016, they are estimated to have cost **\$151.1 billion**. Costs from workplace injury and death include worker compensation costs, administrative expenses, wage and productivity losses, medical costs and damages to company property.

## WHO IS AFFECTED?

Populations that have higher rates of fatal occupational injury include:

- **Men:** Men accounted for **93 percent** of all fatal occupational injury deaths in 2016.
- **Racial and ethnic minorities:** Disparities have been documented in occupational fatalities. **Hispanic or Latino** employees have consistently had a higher rate of fatal injury at work than all workers.
- **Older adults:** Workers **aged 65 and older** had the higher rates of fatal injury (9.6 fatalities per 100,000 Full Time Equivalent workers) compared with workers aged 25 to 34 (2.5 per 100,000 Full Time Equivalent workers).

## WHAT WORKS?

Workplace fatalities are almost always preventable and are an excellent target for interventions. Improvements to workplace safety was lauded as one of the great **public health achievements** of the 20th century. Increased safety precautions and regulatory oversight have been shown to significantly reduced the number of occupational injuries and fatalities, even in the riskiest occupations.<sup>[1,2]</sup>

## GOALS

**Reducing deaths** from work-related injuries in all industries is a Healthy People 2020 objective.

[1] Gordon S. Smith, "Public Health Approaches to Occupational Injury Prevention: Do They Work?", *Injury Prevention* 7, no. Suppl 1 (2001): 3-10. <http://www.doi.org/10.1136/ip.7.suppl.1.3>

[2] Robin Herbert et al, "Work-Related Death: A Continuing Epidemic," *American Journal of Public Health* 90 (2000): 541-45. <https://www.doi.org/10.2105/AJPH.90.4.541>

# Occupational Fatalities by State, 2016 Annual Report

STATE	RANK	VALUE
New York	1	2.5
California	2	2.7
Massachusetts	2	2.7
Washington	2	2.7
Minnesota	5	2.9
New Hampshire	6	3.4
Oregon	6	3.4
Connecticut	8	3.6
New Jersey	9	3.7
Illinois	10	3.9
Arizona	11	4.0
Colorado	11	4.0
Hawaii	11	4.0
Pennsylvania	11	4.0
Maine	15	4.1
Ohio	16	4.2
Michigan	17	4.3
Utah	17	4.3
Vermont	17	4.3
Wisconsin	17	4.3
Delaware	21	4.4
Maryland	21	4.4
Rhode Island	21	4.4
North Carolina	24	4.5
Virginia	24	4.5
Florida	26	4.7
Missouri	26	4.7
Idaho	28	4.8
Nevada	29	4.9
Indiana	30	5.0
Georgia	31	5.2
Tennessee	32	5.3
Iowa	33	5.4
Kansas	33	5.4
Kentucky	35	5.5
Nebraska	35	5.5
New Mexico	37	5.7
Texas	37	5.7
Alabama	39	6.3
Louisiana	39	6.3
Montana	41	6.4
South Dakota	41	6.4
South Carolina	43	6.6
North Dakota	44	7.3
Arkansas	45	7.5
West Virginia	46	7.8
Oklahoma	47	7.9
Mississippi	48	9.6
Alaska	49	9.9
Wyoming	50	12.5
United States	50	4.4
District of Columbia	50	4.9

• Data Unavailable

## SOURCE:

• U.S. Bureau of Labor Statistics, Bureau of Census, Bureau of Economic Analysis, Bureau of Economic Analysis, Bureau of Economic Analysis, Bureau of Economic Analysis

## **APPENDIX B**

## Western Information Office

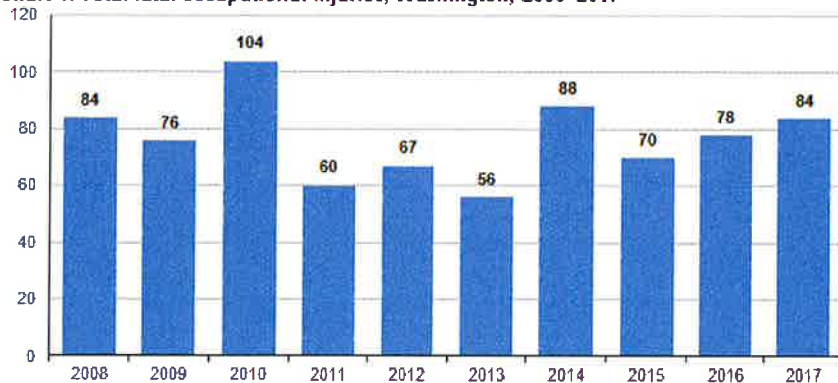
SHARE ON: [f](#) [t](#) [in](#) [Search Western Region](#) [Go](#)
[Western Home](#)
[Western Geography](#)
[Western Subjects](#)
[Western Archives](#)
[Contact Western](#)
[Geographic Information](#) > [Western](#) > News Release

### Fatal Work Injuries in Washington – 2017

Fatal work injuries totaled 84 in 2017 for Washington, the U.S. Bureau of Labor Statistics reported today. Assistant Commissioner for Regional Operations Richard Holden noted that the number of work-related fatalities in Washington was higher than the 78 fatalities in the previous year. Fatal occupational injuries in the state have ranged from a high of 128 in 1996 to a low of 56 in 2013. (See [chart 1.](#))

Nationwide, a total of 5,147 fatal work injuries were recorded in 2017, down slightly from the 5,190 fatal injuries in 2016, according to the results from the Census of Fatal Occupational Injuries (CFOI) program.

**Chart 1. Total fatal occupational injuries, Washington, 2008–2017**



SOURCE: U.S. Bureau of Labor Statistics.

#### Type of incident

In Washington, transportation incidents resulted in 30 fatal work injuries and falls, slips, and trips accounted for 26 fatalities. These two major categories accounted for 67 percent of all workplace fatalities in the state. (See [table 1.](#)) The number of worker deaths from transportation incidents increased by three over the year, while fatalities from falls, slips, and trips were little changed.

Nationally, transportation incidents were the most frequent fatal workplace event in 2017, accounting for 40 percent of fatal work injuries. (See [chart 2.](#)) Falls, slips, or trips was the second-most common fatal event (17 percent), followed by violence and other injuries by persons or animals (16 percent).

#### News Release Information

19-373-SAN  
Wednesday, March 06, 2019

#### Contacts

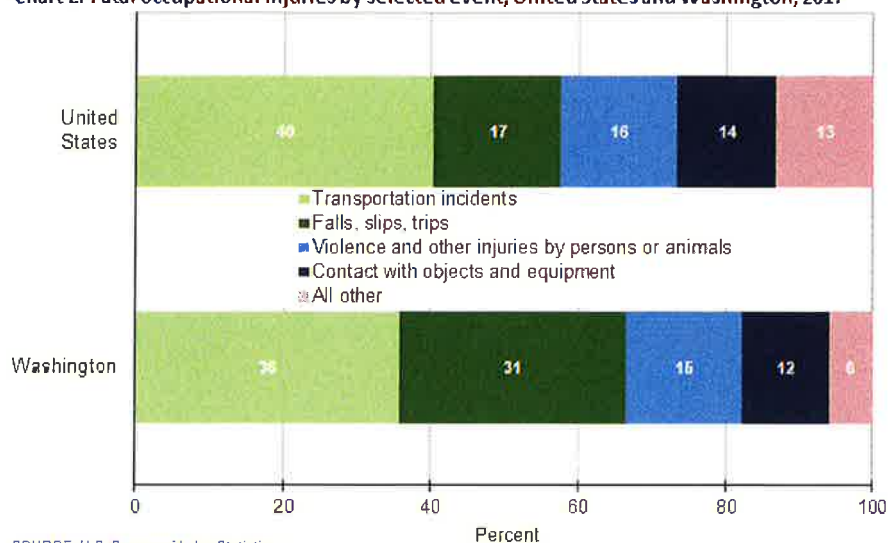
**Technical information:**  
(415) 625-2270  
[BLInfoSF@bls.gov](mailto:BLInfoSF@bls.gov)  
[www.bls.gov/regions/west](http://www.bls.gov/regions/west)

**Media contact:**  
(415) 625-2270

#### PDF

[PDF version](#)

**Chart 2. Fatal occupational injuries by selected event, United States and Washington, 2017**



## Industry

The private construction industry sector had the highest number of fatalities in Washington with 15, similar to the count in the previous year. (See [table 2](#).) Falls, slips, and trips were the most frequent fatal event in the sector with 10 worker deaths. Ten of those fatally injured in this sector worked as specialty trade contractors.

The private agriculture, forestry, fishing, and hunting sector had 14 workplace fatalities in 2017. Crop production accounted for almost half of the fatalities in this industry.

## Occupation

Transportation and material moving occupations had the highest number of workplace fatalities with 30. (See [table 3](#).) Fifteen of these fatalities were heavy and tractor-trailer truck drivers.

## Additional highlights:

- Men accounted for 95 percent of the work-related fatalities in Washington, compared to the 93-percent national share. (See [table 4](#).) Transportation incidents made up 36 percent of the fatalities for men in Washington.
- White non-Hispanics accounted for 74 percent of those who died from a workplace injury. Nationwide, this group accounted for 67 percent of work-related deaths.
- Workers 25-54 years old accounted for 48 percent of the state's work-related fatalities in 2017, compared to 55 percent nationwide.
- Of the 84 fatally-injured workers in Washington, 80 percent worked for wages and salaries; the remainder were self-employed. The most frequent fatal event for wage and salary workers was transportation incidents.

## Technical Note

**Background of the program.** The Census of Fatal Occupational Injuries (CFOI), part of the BLS Occupational Safety and Health Statistics (OSHS) program, compiles a count of all fatal work injuries occurring in the U.S. during the calendar year. The CFOI program uses diverse state, federal, and independent data sources to identify, verify, and describe fatal work injuries. This ensures counts are as complete and accurate as possible. For the 2017 national data, over 23,400 unique source documents were reviewed as part of the data collection process. For technical information and definitions for CFOI, please go to the BLS Handbook of Methods on the BLS website at [www.bls.gov/opub/hom/cfoi/home.htm](http://www.bls.gov/opub/hom/cfoi/home.htm).

**Federal/State agency coverage.** The CFOI includes data for all fatal work injuries, even those that may be outside the scope of other agencies or regulatory coverage. Thus, any comparison between the BLS fatality census counts and those released by other agencies should take into account the different coverage requirements and definitions being used by each agency. More on the scope of CFOI can be found at [www.bls.gov/iif/cfoiscope.htm](http://www.bls.gov/iif/cfoiscope.htm).

**Acknowledgments.** BLS appreciates the efforts of all federal, state, local, and private sector entities that provided source documents used to identify fatal work injuries. Among these agencies are the Occupational Safety and Health Administration; the National Transportation Safety Board; the U.S. Coast Guard; the Mine Safety and Health Administration; the Office of Workers' Compensation Programs (Federal Employees' Compensation and Longshore and Harbor Workers' Compensation divisions); the Federal Railroad Administration; the National Highway Traffic Safety Administration; state vital statistics registrars, coroners, and medical examiners; state departments of health, labor, and industrial relations and workers' compensation agencies; state and local police departments; and state farm bureaus.



**Table 1. Fatal occupational injuries by event or exposure, Washington, 2016–17**

Event or exposure (1)	2016	2017	
	Number	Number	Percent
<b>Total</b>	78	84	100
<b>Violence and other injuries by persons or animals</b>	13	13	15
Intentional injury by person	13	13	15
Homicides (Intentional injury by other person)	9	6	7
Shooting by other person--intentional	7	4	5
Suicides (Self-inflicted injury--intentional)	4	7	8
<b>Transportation incidents</b>	27	30	36
Aircraft incidents	—	1	1
Other in-flight crash	—	1	1
Other in-flight crash into structure, object, or ground	—	1	1
Roadway incidents involving motorized land vehicle	15	18	21
Roadway collision with other vehicle	—	9	11
Roadway collision--moving in opposite directions, oncoming	—	6	7
Roadway collision with object other than vehicle	8	4	5
Vehicle struck object or animal on side of roadway	7	4	5
Roadway noncollision incident	5	5	6
Jack-knifed or overturned, roadway	5	5	6
Nonroadway incident involving motorized land vehicles	4	3	4
<b>Falls, slips, trips</b>	24	26	31
Falls to lower level	22	20	24
Other fall to lower level	16	14	17
<b>Exposure to harmful substances or environments</b>	3	3	4
<b>Contact with objects and equipment</b>	8	10	12
Struck by object or equipment	7	9	11
Struck by powered vehicle--nontransport	—	4	5

Footnotes:

(1) Based on the BLS Occupational Injury and Illness Classification System (OIICS) 2.01 implemented for 2011 data forward.

NOTE: Data for all years are final. Totals for major categories may include subcategories not shown separately. Percentages may not add to totals because of rounding. CFOI fatality counts exclude illness-related deaths unless precipitated by an injury event. Dashes indicate no data reported or data that do not meet publication criteria.

**Table 2. Fatal occupational injuries by industry, Washington, 2016–17**

Industry (1)	2016	2017	
	Number	Number	Percent
<b>Total</b>	78	84	100
<b>Private industry</b>	73	80	95
Natural resources and mining	16	14	17
Agriculture, forestry, fishing and hunting	15	14	17
Construction	14	15	18
Construction	14	15	18
Specialty trade contractors	7	10	12
Foundation, structure, and building exterior contractors	3	5	6
Manufacturing	4	7	8
Manufacturing	4	7	8
Trade, transportation, and utilities	16	26	31
Retail trade	6	10	12
Transportation and warehousing	10	10	12
Truck transportation	8	7	8
Financial activities	6	4	5
Professional and business services	8	8	10
Administrative and waste services	8	8	10
Administrative and support services	8	6	7
Services to buildings and dwellings	5	6	7
Landscaping services	5	4	5
Leisure and hospitality	—	1	1
Other services, except public administration	3	1	1
Other services, except public administration	3	1	1

Footnotes:

(1) Industry data are based on the North American Industry Classification System, 2012.

(2) Includes fatal injuries to workers employed by governmental organizations regardless of industry.

NOTE: Data for all years are final. Totals for major categories may include subcategories not shown separately. Percentages may not add to totals because of rounding. CFOI fatality counts exclude illness-related deaths unless precipitated by an injury event. Dashes indicate no data reported or data that do not meet publication criteria.

Industry (1)	2016	2017	
	Number	Number	Percent
Repair and maintenance	--	1	1
Government (2)	5	4	5
Federal government	--	1	1

Footnotes:

(1) Industry data are based on the North American Industry Classification System, 2012.

(2) Includes fatal injuries to workers employed by governmental organizations regardless of industry.

NOTE: Data for all years are final. Totals for major categories may include subcategories not shown separately. Percentages may not add to totals because of rounding. CFOI fatality counts exclude illness-related deaths unless precipitated by an injury event. Dashes indicate no data reported or data that do not meet publication criteria.

**Table 3. Fatal occupational injuries by occupation, Washington, 2016–17**

Occupation (1)	2016	2017	
	Number	Number	Percent
Total	78	84	100
Management occupations	4	2	2
Other management occupations	3	2	2
Farmers, ranchers, and other agricultural managers	--	1	1
Farmers, ranchers, and other agricultural managers	--	1	1
Building and grounds cleaning and maintenance occupations	5	5	6
Grounds maintenance workers	4	3	4
Grounds maintenance workers	4	3	4
Landscaping and groundskeeping workers	3	1	1
Sales and related occupations	6	7	8
Supervisors of sales workers	1	3	4
First-line supervisors of sales workers	1	3	4
Construction and extraction occupations	14	14	17
Construction trades workers	9	13	15
Installation, maintenance, and repair occupations	7	8	10
Vehicle and mobile equipment mechanics, installers, and repairers	--	--	--
Other installation, maintenance, and repair occupations	6	4	5
Production occupations	--	4	5
Transportation and material moving occupations	18	30	36
Air transportation workers	--	1	1
Aircraft pilots and flight engineers	--	1	1
Commercial pilots	--	1	1
Motor vehicle operators	13	18	21
Driver/sales workers and truck drivers	13	18	21
Heavy and tractor-trailer truck drivers	11	15	18
Material moving workers	3	7	8

Footnotes:

(1) Occupation data are based on the Standard Occupational Classification system, 2010.

NOTE: Data for all years are final. Totals for major categories may include subcategories not shown separately. Percentages may not add to totals because of rounding. CFOI fatality counts exclude illness-related deaths unless precipitated by an injury event. Dashes indicate no data reported or data that do not meet publication criteria.

**Table 4. Fatal occupational injuries by selected demographic characteristics, Washington, 2016–17**

Worker characteristics	2016	2017	
	Number	Number	Percent
Total	78	84	100
Employee status			
Wage and salary workers (1)	59	67	80
Self-employed (2)	19	17	20
Gender			
Men	70	80	95
Women	8	4	5
Age (3)			
20 to 24 years	5	3	4
25 to 34 years	9	14	17

Footnotes:

(1) May include volunteers and workers receiving other types of compensation.

(2) Includes self-employed workers, owners of unincorporated businesses and farms, paid and unpaid family workers, and may include some owners of incorporated businesses or members of partnerships.

(3) Information may not be available for all age groups.

(4) Persons identified as Hispanic or Latino may be of any race. The race categories shown exclude Hispanic and Latino workers.

NOTE: Data for all years are final. Totals for major categories may include subcategories not shown separately. Percentages may not add to totals because of rounding. CFOI fatality counts exclude illness-related deaths unless precipitated by an injury event. Dashes indicate no data reported or data that do not meet publication criteria.

Worker characteristics	2016	2017	
	Number	Number	Percent
35 to 44 years	13	11	13
45 to 54 years	19	15	18
55 to 64 years	18	24	29
65 years and over	13	16	19
Race or ethnic origin <sup>(4)</sup>			
White (non-Hispanic)	60	62	74
Black or African-American (non-Hispanic)	--	4	5
Hispanic or Latino	13	9	11
Asian (non-Hispanic)	--	1	1

Footnotes:

(1) May include volunteers and workers receiving other types of compensation.

(2) Includes self-employed workers, owners of unincorporated businesses and farms, paid and unpaid family workers, and may include some owners of incorporated businesses or members of partnerships.

(3) Information may not be available for all age groups.

(4) Persons identified as Hispanic or Latino may be of any race. The race categories shown exclude Hispanic and Latino workers.

NOTE: Data for all years are final. Totals for major categories may include subcategories not shown separately. Percentages may not add to totals because of rounding. CFOI fatality counts exclude illness-related deaths unless precipitated by an injury event. Dashes indicate no data reported or data that do not meet publication criteria.

**Last Modified Date:** Wednesday, March 06, 2019

RECOMMEND THIS PAGE USING:  Facebook  Twitter  LinkedIn

#### TOOLS

Areas at a Glance  
Industries at a Glance  
Economic Releases  
Databases & Tables  
Maps

#### CALCULATORS

Inflation  
Injury And Illness

#### HELP

Help & Tutorials  
FAQs  
Glossary  
About BLS  
Contact Us

#### INFO

What's New  
Careers @ BLS  
Find It! DOL  
Join our Mailing Lists  
Linking & Copyright Info

#### RESOURCES

Inspector General (OIG)  
Budget and Performance  
No Fear Act  
USA.gov  
Benefits.gov



[Freedom of Information Act](#) | [Privacy & Security Statement](#) | [Disclaimers](#) | [Customer Survey](#) | [Important Web Site Notices](#)

U.S. Bureau of Labor Statistics | Western Information Office, Attn: EA & I, 90 Seventh Street, Suite 14-100, San Francisco, CA 94103-6715  
[www.bls.gov/regions/west](http://www.bls.gov/regions/west) | Telephone: 1-415-625-2270 | [Contact Western Region](#)

## **APPENDIX C**

# NEWS RELEASE

## BUREAU OF LABOR STATISTICS

U. S. D E P A R T M E N T O F L A B O R



For release 10:00 a.m. (EST) Tuesday, December 18, 2018

USDL-18-1978

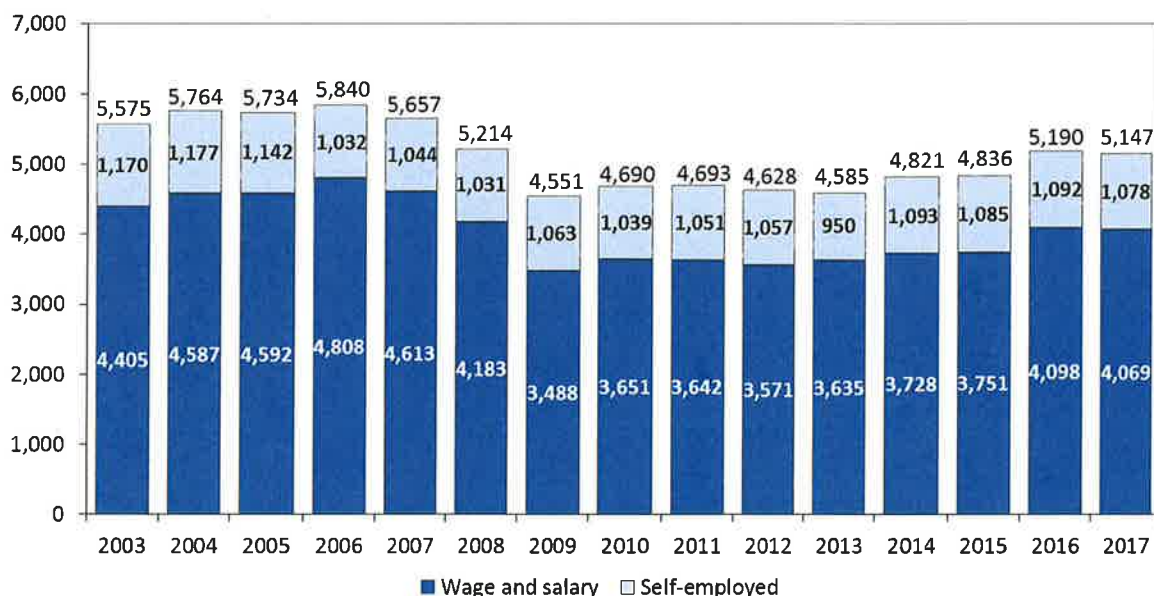
Technical information: (202) 691-6170 • [iifstaff@bls.gov](mailto:iifstaff@bls.gov) • [www.bls.gov/iif/oshcfoi1.htm](http://www.bls.gov/iif/oshcfoi1.htm)

Media contact: (202) 691-5902 • [PressOffice@bls.gov](mailto:PressOffice@bls.gov)

### NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2017

There were a total of 5,147 fatal work injuries recorded in the United States in 2017, down slightly from the 5,190 fatal injuries reported in 2016, the U.S. Bureau of Labor Statistics reported today. (See chart 1.) The fatal injury rate decreased to 3.5 per 100,000 full-time equivalent (FTE) workers from 3.6 in 2016. (See table 1.)

Chart 1. Number of fatal work injuries by employee status, 2003–17

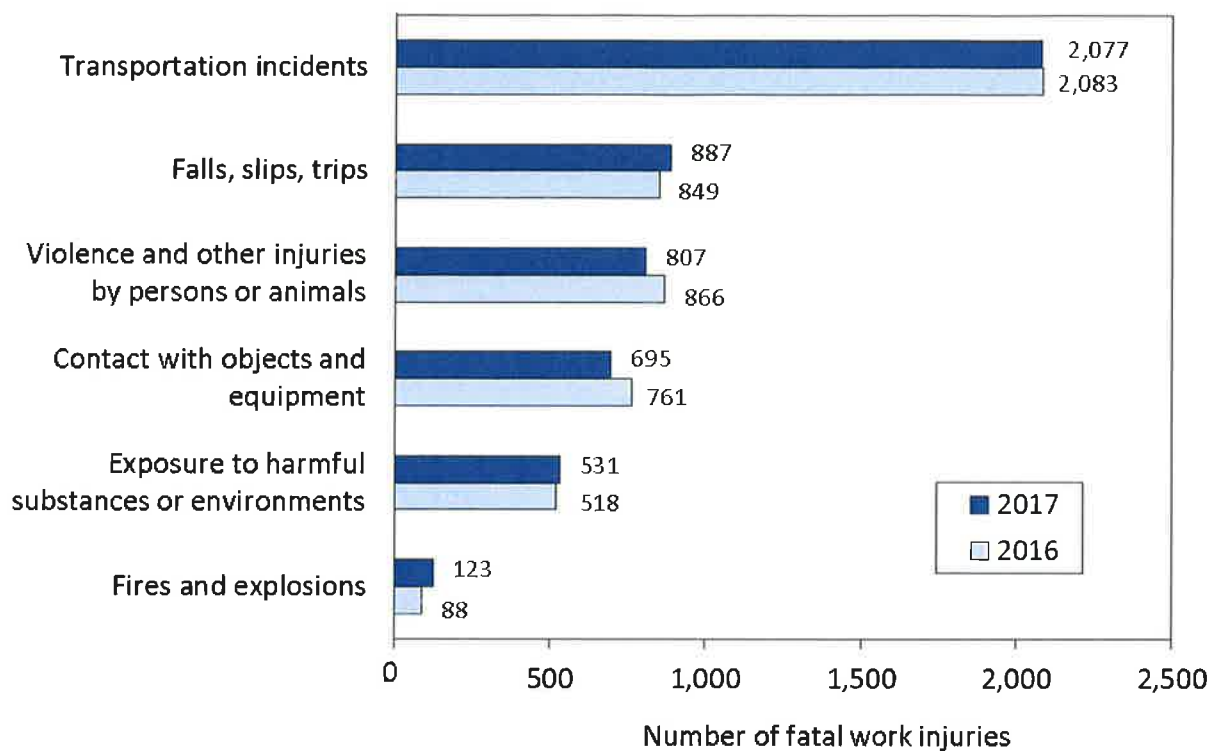


### Type of incident

Fatal falls were at their highest level in the 26-year history of the Census of Fatal Occupational Injuries (CFOI) accounting for 887 (17 percent) worker deaths. Transportation incidents remained the most frequent fatal event in 2017 with 2,077 (40 percent) occupational fatalities. Violence and other injuries by persons or animals decreased 7 percent in 2017 with homicides and suicides decreasing by 8 percent and 5 percent, respectively. (See chart 2 and table 2.)

- Unintentional overdoses due to nonmedical use of drugs or alcohol while at work increased 25 percent from 217 in 2016 to 272 in 2017. This was the fifth consecutive year in which unintentional workplace overdose deaths have increased by at least 25 percent.
- Contact with objects and equipment incidents were down 9 percent (695 in 2017 from 761 in 2016) with caught in running equipment or machinery deaths down 26 percent (76 in 2017 from 103 in 2016).
- Fatal occupational injuries involving confined spaces rose 15 percent to 166 in 2017 from 144 in 2016.
- Crane-related workplace fatalities fell to their lowest level ever recorded in CFOI, 33 deaths in 2017.

Chart 2. Fatal occupational injuries by major event, 2016-17

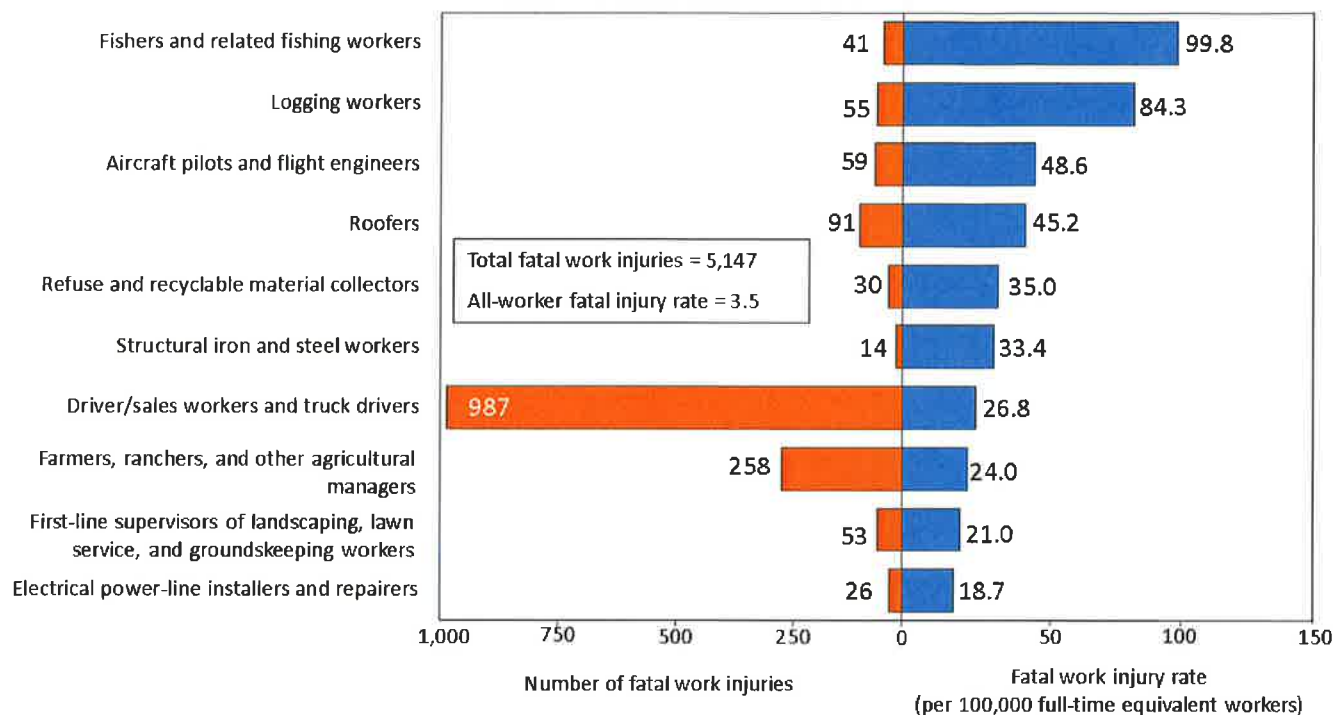


### Occupation

The transportation and material moving occupational group and the construction and extraction occupational group accounted for 47 percent of worker deaths in 2017. Within the occupational subgroup driver/sales workers and truck drivers, heavy and tractor-trailer truck drivers had the largest number of fatal occupational injuries with 840. This represented the highest value for heavy and tractor-trailer truck drivers since the occupational series began in 2003. Fishers and related fishing workers and logging workers had the highest published rates of fatal injury in 2017. (See chart 3.)

- Grounds maintenance workers (including first-line supervisors) incurred 244 fatalities in 2017. This was a small decrease from the 2016 figure (247) but was still the second-highest total since 2003. A total of 36 deaths were due to falls from trees, and another 35 were due to being struck by a falling tree or branch.
- There were 258 fatalities among farmers, ranchers, and other agricultural managers in 2017. Approximately 63 percent of these farmers were age 65 and over (162) with 48 being age 80 or over. Of the 258 deaths, 103 involved a farm tractor.
- Police and sheriff's patrol officers incurred 95 fatal occupational injuries in 2017, fewer than the 108 fatalities in 2016.

### Chart 3. Civilian occupations with high fatal work injury rates, 2017



#### Other key findings of the 2017 Census of Fatal Occupational Injuries:

- Fifteen percent of the fatally-injured workers in 2017 were age 65 or over – a series high. In 1992, the first year CFOI published national data, that figure was 8 percent. These workers also had a higher fatality rate than other age groups in 2017. (See table 1.)
- Fatalities incurred by non-Hispanic Black or African American workers and non-Hispanic Asian workers each decreased 10 percent from 2016 to 2017.
- Fatal occupational injuries in the private manufacturing industry and wholesale trade industry were the lowest since this series began in 2003. (See table 4.)
- Workplace fatalities in the private mining, quarrying, and oil and gas extraction industry increased 26 percent to 112 in 2017 from a series low of 89 in 2016. (See table 4.) Over 70 percent of these fatalities were incurred by workers in the oil and gas extraction industries.
- A total of 27 states had fewer fatal workplace injuries in 2017 than 2016, while 21 states and the District of Columbia had more; California and Maine had the same number as 2016. (See table 5.) A total of 192 metropolitan statistical areas (MSAs) had 5 or more fatal work injuries in 2017.

## **TECHNICAL NOTES**

### **Background of the program**

The Census of Fatal Occupational Injuries (CFOI), part of the Bureau of Labor Statistics (BLS) Occupational Safety and Health Statistics (OSHS) program, compiles a count of all fatal work injuries occurring in the U.S. during the calendar year. The CFOI program uses diverse state, federal, and independent data sources to identify, verify, and describe fatal work injuries. This ensures counts are as complete and accurate as possible. For the 2017 data, over 23,400 unique source documents were reviewed as part of the data collection process. For technical information and definitions for CFOI, please go to the BLS Handbook of Methods on the BLS website at [www.bls.gov/opub/hom/cfoi/home.htm](http://www.bls.gov/opub/hom/cfoi/home.htm). Fatal injury rates are subject to sampling errors as they are calculated using employment data from the Current Population Survey (CPS), a sample of households, and the BLS Local Area Unemployment Statistics (LAUS) program. For more information on measurement errors, please see: [www.bls.gov/iif/osh\\_rse.htm](http://www.bls.gov/iif/osh_rse.htm).

The Survey of Occupational Injuries and Illnesses (SOII), another component of the OSHS program, presents frequency counts and incidence rates by industry and also by detailed case circumstances and worker characteristics for nonfatal workplace injuries and illnesses for cases that result in days away from work. Incidence rates by industry and case type and information on case circumstances and worker characteristics for 2017 were published in November 2018. For additional data, access the BLS website: [www.bls.gov/iif](http://www.bls.gov/iif).

### **Identification and verification of work-related fatalities**

In 2017 there were 14 fatal work injuries included for which work relationship could not be independently verified; however, the information on the initiating source document for these cases was sufficient to determine that the incident was likely to be job-related. Data for these fatalities were included in the CFOI counts.

### **Federal/State agency coverage**

The CFOI includes data for all fatal work injuries, even those that may be outside the scope of other agencies or regulatory coverage. Thus, any comparison between the BLS fatality census counts and those released by other agencies should take into account the different coverage requirements and definitions being used by each agency. More on the scope of CFOI can be found at [www.bls.gov/iif/cfoiscope.htm](http://www.bls.gov/iif/cfoiscope.htm) and [www.bls.gov/opub/hom/cfoi/concepts.htm](http://www.bls.gov/opub/hom/cfoi/concepts.htm).

### **Acknowledgements**

BLS thanks the participating states, New York City, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and Guam for their efforts in collecting accurate, comprehensive, and useful data on fatal work injuries. Although data for Puerto Rico, the U.S. Virgin Islands, and Guam are not included in the national totals for this release, results for these jurisdictions are available. Participating agencies may be contacted to request more detailed state results. Contact information is available at [www.bls.gov/iif/oshstate.htm](http://www.bls.gov/iif/oshstate.htm).

BLS also appreciates the efforts of all federal, state, local, and private sector entities that provided source documents used to identify fatal work injuries. Among these agencies are the Occupational Safety and Health Administration; the National Transportation Safety Board; the U.S. Coast Guard; the Mine Safety and Health Administration; the Office of Workers' Compensation Programs (Federal Employees' Compensation and Longshore and Harbor Workers' Compensation divisions); the Federal Railroad Administration; the National Highway Traffic Safety Administration; state vital statistics registrars, coroners, and medical examiners; state departments of health, labor, and industrial relations and workers' compensation agencies; state and local police departments; and state farm bureaus.

Information in this release is available to sensory-impaired individuals. Voice phone: (202) 691-5200; Federal Relay Service: (800) 877-8339.



Table 1. Fatal occupational injuries counts and rates by selected demographic characteristics, 2016-17

Characteristic	Counts		Rates <sup>1</sup>		Rates Margin of Error <sup>2</sup>	
	2016	2017	2016	2017	2016	2017
Total <sup>3</sup>	5,190	5,147	3.6	3.5	0.0	0.0
<b>Employee status</b>						
Wage and salary workers <sup>4</sup>	4,098	4,069	3.0	2.9	0.0	0.0
Self-employed <sup>5</sup>	1,092	1,078	13.1	13.1	0.3	0.3
<b>Gender</b>						
Women	387	386	0.6	0.6	0.0	0.0
Men	4,803	4,761	5.8	5.7	0.0	0.0
<b>Age</b>						
Under 16 years	13	15	N/A	N/A	N/A	N/A
16 to 17 years	17	7	2.1	0.8	0.1	0.0
18 to 19 years	43	62	1.9	2.6	0.1	0.1
20 to 24 years	310	293	2.4	2.2	0.0	0.0
25 to 34 years	834	872	2.5	2.5	0.0	0.0
35 to 44 years	979	907	3.1	2.9	0.0	0.0
45 to 54 years	1,145	1,059	3.5	3.3	0.0	0.0
55 to 64 years	1,160	1,155	4.7	4.6	0.0	0.0
65 years and over	688	775	9.6	10.3	0.2	0.2
<b>Race or ethnic origin<sup>6</sup></b>						
White (non-Hispanic)	3,481	3,449	3.7	3.6	0.0	0.0
Black or African-American (non-Hispanic)	587	530	3.6	3.2	0.0	0.0
Hispanic or Latino	879	903	3.7	3.7	0.0	0.0
American Indian or Alaskan Native (non-Hispanic)	38	38	N/A	N/A	N/A	N/A
Asian (non-Hispanic)	160	144	1.8	1.6	0.0	0.0
Native Hawaiian or Pacific Islander (non-Hispanic)	7	17	N/A	N/A	N/A	N/A
Multiple races (non-Hispanic)	15	9	N/A	N/A	N/A	N/A
Other races or not reported (non-Hispanic)	23	57	N/A	N/A	N/A	N/A

<sup>1</sup> Fatal injury rates are per 100,000 full-time equivalent workers (FTEs). Fatal injury rates exclude workers under the age of 16 years, volunteers, and resident military. Complete national rates can be found at [www.bls.gov/iif/oshcfoi1.htm#rates](http://www.bls.gov/iif/oshcfoi1.htm#rates). Complete state rates can be found at [www.bls.gov/iif/oshstate.htm](http://www.bls.gov/iif/oshstate.htm). National and state rates are calculated using different methodology and cannot be directly compared. Please see [www.bls.gov/iif/oshfaq1.htm#q16](http://www.bls.gov/iif/oshfaq1.htm#q16) for more information on how rates are calculated and caveats for comparison. N/A means a rate was not published for this group.

<sup>2</sup> Fatal injury rates rely on the census figures from the CFOI and the employment from the Current Population Survey (CPS). CPS is a sample of households that is designed to represent the civilian noninstitutional population of the United States. Sampling errors occur in the CPS because observations are made on a sample, not on the entire population. The margin of error (MOE) is a measure of dispersion around the estimated fatal injury rate, expressed at the 95% confidence level. For more on confidence intervals, see [https://www.bls.gov/iif/osh\\_rse.htm](https://www.bls.gov/iif/osh_rse.htm).

<sup>3</sup> The Census of Fatal Occupational Injuries (CFOI) has published data on fatal occupational injuries for the United States since 1992. During this time, the classification systems and definitions of many data elements have changed. Please see the CFOI Definitions page ([www.bls.gov/iif/oshcfoi.htm](http://www.bls.gov/iif/oshcfoi.htm)) for a more detailed description of each data element and their definitions.

<sup>4</sup> May include volunteers and workers receiving other types of compensation.

<sup>5</sup> Includes self-employed workers, owners of unincorporated businesses and farms, paid and unpaid family workers, and may include some owners of incorporated businesses or members of partnerships.

<sup>6</sup> Persons identified as Hispanic or Latino may be of any race. The race categories shown exclude data for Hispanics and Latinos.

Note: Data for all years are final. Totals for major categories may include subcategories not shown separately. CFOI fatal injury counts exclude illness-related deaths unless precipitated by an injury event.

Source: U.S. Bureau of Labor Statistics, Current Population Survey, Census of Fatal Occupational Injuries

Table 2. Fatal occupational injuries for selected events or exposures, 2011-17

Characteristic	Counts						
	2011	2012	2013	2014	2015	2016	2017
<b>Total<sup>1</sup></b>	4,693	4,628	4,585	4,821	4,836	5,190	5,147
<b>Event or exposure</b>							
<b>Violence and other injuries by persons or animals</b>	791	803	773	765	703	866	807
Intentional injury by person	718	725	686	689	646	792	733
Homicides	468	475	404	409	417	500	458
Shooting by other person—intentional	365	381	322	307	354	394	351
Stabbing, cutting, slashing, piercing	42	35	38	40	28	38	47
Suicides	250	249	282	280	229	291	275
<b>Transportation incidents</b>	1,937	1,923	1,865	1,984	2,054	2,083	2,077
Aircraft incidents	145	127	136	135	139	130	126
Rail vehicle incidents	50	38	41	57	50	50	48
Pedestrian vehicular incident	316	293	294	318	289	342	313
Pedestrian struck by vehicle in work zone	63	65	48	53	44	58	56
Water vehicle incident	72	63	60	55	44	48	68
Roadway incident involving motorized land vehicle	1,103	1,153	1,099	1,157	1,264	1,252	1,299
Roadway collision with other vehicle	525	565	564	611	660	628	663
Roadway collision moving in same direction	150	124	144	146	166	168	189
Roadway collision moving in opposite directions, oncoming	172	204	192	230	224	199	214
Roadway collision moving perpendicularly	111	134	136	131	154	150	149
Roadway collision with object other than vehicle	313	338	332	317	360	342	377
Vehicle struck object or animal on side of roadway	292	318	311	292	335	321	348
Roadway noncollision incident	262	247	201	228	240	278	252
Jack-knifed or overturned, roadway	208	202	171	193	201	238	197
Nonroadway incident involving motorized land vehicle	222	233	227	248	253	245	209
Nonroadway noncollision incident	169	175	181	191	182	182	166
Jack-knifed or overturned, nonroadway	113	115	118	127	131	120	111
<b>Fire or explosion</b>	144	122	149	137	121	88	123
<b>Fall, slip, trip</b>	681	704	724	818	800	849	887
Fall on same level	111	120	110	138	125	134	151
Fall to lower level	553	570	595	660	648	697	713
Fall from collapsing structure or equipment	38	35	45	44	55	65	48
Fall through surface or existing opening	60	72	68	82	87	87	85
<b>Exposure to harmful substances or environments</b>	419	340	335	390	424	518	531
Exposure to electricity	174	156	141	154	134	154	136
Exposure to temperature extremes	63	41	38	26	40	48	38
Exposure to other harmful substances	144	110	124	182	215	268	317
Nonmedical use of drugs or alcohol unintentional overdose	73	65	82	114	165	217	272
Inhalation of harmful substance	57	40	39	59	45	39	43
<b>Contact with objects and equipment</b>	710	723	721	715	722	761	695
Struck by object or equipment	476	519	509	503	519	553	503
Struck by powered vehicle nontransport	196	201	197	202	216	232	197
Struck by falling object or equipment	219	241	245	243	247	255	237
Caught in or compressed by equipment or objects	145	124	131	132	99	117	108
Caught in running equipment or machinery	118	93	105	105	74	103	76
Struck, caught, or crushed in collapsing structure, equipment, or material	84	73	78	74	90	82	70

<sup>1</sup> The Census of Fatal Occupational Injuries (CFOI) has published data on fatal occupational injuries for the United States since 1992. During this time, the classification systems and definitions of many data elements have changed. Please see the CFOI Definitions page ([www.bls.gov/iif/oshcfdef.htm](http://www.bls.gov/iif/oshcfdef.htm)) for a more detailed description of each data element and their definitions. Event or exposure is based on the BLS Occupational Injury and Illness Classification System (OIICS) 2.01 implemented for 2011 data forward.

Note: Data for all years are final. Totals for major categories may include subcategories not shown separately. CFOI fatal injury counts exclude illness-related deaths unless precipitated by an injury event.

Source: U.S. Department of Labor, Bureau of Labor Statistics, Census of Fatal Occupational Injuries

Table 3. Fatal occupational injuries counts and rates for selected occupations, 2016-17

Characteristic	Counts		Rates <sup>1</sup>		Rates Margin of Error <sup>2</sup>	
	2016	2017	2016	2017	2016	2017
Total <sup>3</sup>	5,190	5,147	3.6	3.5	0.0	0.0
<b>Occupation (SOC)</b>						
<b>Management occupations</b>	377	396	2.0	2.1	0.0	0.0
<b>Business and financial operations occupations</b>	27	29	0.4	0.4	0.0	0.0
<b>Computer and mathematical occupations</b>	16	11	0.3	0.2	0.0	0.0
<b>Architecture and engineering occupations</b>	41	23	1.3	0.7	0.0	0.0
<b>Life, physical, and social science occupations</b>	15	13	1.1	0.9	0.1	0.1
<b>Community and social services occupations</b>	27	37	1.0	1.4	0.0	0.1
<b>Legal occupations</b>	13	11	N/A	0.6	N/A	0.0
<b>Education, training, and library occupations</b>	32	30	0.4	0.4	0.0	0.0
<b>Arts, design, entertainment, sports, and media occupations</b>	64	47	2.3	1.6	0.1	0.1
<b>Healthcare practitioners and technical occupations</b>	60	57	0.7	0.6	0.0	0.0
<b>Healthcare support occupations</b>	30	28	1.0	0.9	0.0	0.0
<b>Protective service occupations</b>	281	266	8.4	7.7	0.3	0.3
Fire fighting and prevention workers	35	35	N/A	N/A	N/A	N/A
Law enforcement workers	127	117	N/A	N/A	N/A	N/A
<b>Food preparation and serving related occupations</b>	92	89	1.3	1.4	0.0	0.0
<b>Building and grounds cleaning and maintenance occupations</b>	329	326	6.6	6.4	0.2	0.2
Building cleaning and pest control workers	74	68	N/A	N/A	N/A	N/A
Grounds maintenance workers	217	191	17.4	15.5	1.0	0.9
<b>Personal care and service occupations</b>	55	69	1.1	1.2	0.0	0.0
<b>Sales and related occupations</b>	254	232	1.8	1.6	0.0	0.0
Supervisors, sales workers	104	98	N/A	N/A	N/A	N/A
Retail sales workers	102	89	N/A	N/A	N/A	N/A
<b>Office and administrative support occupations</b>	78	101	0.5	0.6	0.0	0.0
<b>Farming, fishing, and forestry occupations</b>	290	264	24.9	20.9	2.0	1.9
Agricultural workers	157	155	N/A	N/A	N/A	N/A
Fishing and hunting workers	26	41	N/A	N/A	N/A	N/A
Forest, conservation, and logging workers	95	57	N/A	N/A	N/A	N/A
<b>Construction and extraction occupations</b>	970	965	12.4	12.2	0.3	0.3
Supervisors of construction and extraction workers	134	121	18.0	17.4	1.2	1.2
Construction trades workers	736	747	N/A	N/A	N/A	N/A
Extraction workers	41	41	N/A	N/A	N/A	N/A
<b>Installation, maintenance, and repair occupations</b>	470	414	9.4	8.1	0.2	0.2
Vehicle and mobile equipment mechanics, installers, and repairers	154	143	N/A	N/A	N/A	N/A
<b>Production occupations</b>	216	221	2.6	2.6	0.1	0.1
<b>Transportation and material moving occupations</b>	1,388	1,443	15.4	15.9	0.3	0.4
Air transportation workers	75	59	N/A	N/A	N/A	N/A
Motor vehicle operators	1,012	1,084	N/A	N/A	N/A	N/A
Material moving workers	228	235	N/A	N/A	N/A	N/A
<b>Military occupations<sup>4</sup></b>	62	72	N/A	N/A	N/A	N/A

<sup>1</sup> Fatal injury rates are per 100,000 full-time equivalent workers (FTEs). Fatal injury rates exclude workers under the age of 16 years, volunteers, and resident military. Complete national rates can be found at [www.bls.gov/iif/oshcfoi1.htm#rates](http://www.bls.gov/iif/oshcfoi1.htm#rates). Complete state rates can be found at [www.bls.gov/iif/oshstate.htm](http://www.bls.gov/iif/oshstate.htm). National and state rates are calculated using different methodology and cannot be directly compared. Please see [www.bls.gov/iif/oshfaq1.htm#q16](http://www.bls.gov/iif/oshfaq1.htm#q16) for more information on how rates are calculated and caveats for comparison. N/A means a rate was not published for this group.

<sup>2</sup> Fatal injury rates rely on the census figures from the CFOI and the employment from the Current Population Survey (CPS). CPS is a sample of households that is designed to represent the civilian noninstitutional population of the United States. Sampling errors occur in the CPS because observations are made on a sample, not on the entire population. The margin of error (MOE) is a measure of dispersion around the estimated fatal injury rate, expressed at the 95% confidence level. For more on confidence intervals, see [https://www.bls.gov/iif/osh\\_rse.htm](https://www.bls.gov/iif/osh_rse.htm).

<sup>3</sup> The Census of Fatal Occupational Injuries (CFOI) has published data on fatal occupational injuries for the United States since 1992. During this time, the classification systems and definitions of many data elements have changed. Please see the CFOI Definitions page ([www.bls.gov/iif/oshcfoi1.htm](http://www.bls.gov/iif/oshcfoi1.htm)) for a more detailed description of each data element and their definitions. Occupation is based on the Standard Occupational Classification (SOC) 2010 system.

<sup>4</sup> Includes fatal injuries to persons identified as resident armed forces regardless of individual occupation listed.

Note: Data for all years are final. Totals for major categories may include subcategories not shown separately. CFOI fatal injury counts exclude illness-related deaths unless precipitated by an injury event.

Source: U.S. Bureau of Labor Statistics, Current Population Survey, Census of Fatal Occupational Injuries

Table 4. Fatal occupational injuries counts and rates by selected industries, 2016-17

Characteristic	Counts		Rates <sup>1</sup>		Rates Margin of Error <sup>2</sup>	
	2016	2017	2016	2017	2016	2017
Total <sup>3</sup>	5,190	5,147	3.6	3.5	0.0	0.0
<b>Industry (NAICS)</b>						
<b>Private industry<sup>4</sup></b>	4,693	4,674	3.8	3.7	0.0	0.0
<b>Goods producing</b>	1,991	1,967	6.8	6.7	0.1	0.1
<b>Agriculture, forestry, fishing and hunting</b>	593	581	23.2	23.0	1.5	1.7
Crop production	261	263	20.9	20.9	2.0	2.1
Animal production and aquaculture	151	152	15.4	16.4	1.4	1.7
Forestry and logging	106	76	N/A	N/A	N/A	N/A
<b>Mining, quarrying, and oil and gas extraction<sup>5</sup></b>	89	112	10.1	12.9	1.5	2.2
Mining (except oil and gas)	22	31	10.0	15.5	2.1	3.6
Support activities for mining	56	73	10.1	12.8	2.1	2.9
<b>Construction</b>	991	971	10.1	9.5	0.2	0.2
Construction of buildings	182	196	N/A	N/A	N/A	N/A
Heavy and civil engineering construction	159	152	N/A	N/A	N/A	N/A
Specialty trade contractors	631	610	N/A	N/A	N/A	N/A
<b>Manufacturing</b>	318	303	2.0	1.9	0.0	0.0
Food manufacturing	40	51	2.3	2.8	0.1	0.2
Fabricated metal product manufacturing	41	50	3.4	4.3	0.2	0.3
<b>Service providing</b>	2,702	2,707	2.8	2.8	0.0	0.0
<b>Wholesale trade</b>	179	174	4.8	4.8	0.2	0.2
<b>Retail trade</b>	282	287	1.9	2.0	0.0	0.0
Motor vehicle and parts dealers	42	54	1.9	2.5	0.1	0.1
Food and beverage stores	71	60	2.7	2.3	0.1	0.1
<b>Transportation and warehousing</b>	825	882	14.3	15.1	0.4	0.5
Truck transportation	570	599	25.6	28.0	1.0	1.5
<b>Utilities</b>	30	28	2.8	2.6	0.2	0.2
<b>Information</b>	46	43	1.7	1.6	0.1	0.1
<b>Finance and insurance</b>	26	32	0.4	0.5	0.0	0.0
<b>Real estate and rental and leasing</b>	91	69	3.2	2.4	0.1	0.1
<b>Professional, scientific, and technical services</b>	100	69	0.9	0.6	0.0	0.0
<b>Administrative and support and waste management and remediation services</b>	439	460	N/A	N/A	N/A	N/A
<b>Educational services</b>	42	43	1.0	1.0	0.0	0.0
<b>Health care and social assistance</b>	117	146	0.7	0.8	0.0	0.0
<b>Arts, entertainment, and recreation</b>	96	91	3.9	3.2	0.2	0.1
<b>Accommodation and food services</b>	202	171	2.2	1.9	0.0	0.0
<b>Other services, except public administration</b>	223	205	3.2	2.9	0.1	0.1
<b>Government<sup>6</sup></b>	497	473	2.2	2.0	0.0	0.0
<b>Federal government<sup>4</sup></b>	107	116	1.2	1.3	0.0	0.1
<b>State government<sup>4</sup></b>	97	91	1.5	1.4	0.0	0.0
<b>Local government<sup>4</sup></b>	291	265	3.0	2.6	0.1	0.1

<sup>1</sup> Fatal injury rates are per 100,000 full-time equivalent workers (FTEs). Fatal injury rates exclude workers under the age of 16 years, volunteers, and resident military. Complete national rates can be found at [www.bls.gov/iif/oshcfoi1.htm#rates](http://www.bls.gov/iif/oshcfoi1.htm#rates). Complete state rates can be found at [www.bls.gov/iif/oshstate.htm](http://www.bls.gov/iif/oshstate.htm). National and state rates are calculated using different methodology and cannot be directly compared. Please see [www.bls.gov/iif/oshfaq1.htm#q16](http://www.bls.gov/iif/oshfaq1.htm#q16) for more information on how rates are calculated and caveats for comparison. N/A means a rate was not published for this group.

<sup>2</sup> Fatal injury rates rely on the census figures from the CFOI and the employment from the Current Population Survey (CPS). CPS is a sample of households that is designed to represent the civilian noninstitutional population of the United States. Sampling errors occur in the CPS because observations are made on a sample, not on the entire population. The margin of error (MOE) is a measure of dispersion around the estimated fatal injury rate, expressed at the 95% confidence level. For more on confidence intervals, see [https://www.bls.gov/iif/osh\\_rse.htm](https://www.bls.gov/iif/osh_rse.htm).

<sup>3</sup> The Census of Fatal Occupational Injuries (CFOI) has published data on fatal occupational injuries for the United States since 1992. During this time, the classification systems and definitions of many data elements have changed. Please see the CFOI Definitions page ([www.bls.gov/iif/oshcfoi1.htm](http://www.bls.gov/iif/oshcfoi1.htm)) for a more detailed description of each data element and their definitions. Industry is based on the 2012 North American Industry Classification System (NAICS).

<sup>4</sup> Includes all fatal occupational injuries meeting this ownership criterion across all specified years, regardless of industry classification system.

<sup>5</sup> Includes fatal injuries at all establishments categorized as Mining, quarrying, and oil and gas extraction (Sector 21) in the North American Industry Classification System, including establishments not governed by the Mine Safety and Health Administration (MSHA) rules and reporting, such as those in Oil and Gas Extraction.

<sup>6</sup> Includes fatal injuries to workers employed by governmental organizations regardless of industry. Includes all fatal occupational injuries meeting this ownership criterion across all specified years, regardless of industry classification system.

Note: Data for all years are final. Totals for major categories may include subcategories not shown separately. CFOI fatal injury counts exclude illness-related deaths unless precipitated by an injury

Source: U.S. Bureau of Labor Statistics, Current Population Survey, Census of Fatal Occupational Injuries

Table 5. Fatal occupational injuries counts and rates by state of incident, 2016-17

Characteristic	Counts		Rates <sup>1</sup>	
	2016	2017	2016	2017
Total <sup>2</sup>	5,190	5,147	3.6	3.5
State of incident				
Alabama	100	83	5.2	4.3
Alaska	35	33	10.6	10.2
Arizona	77	90	2.6	3.0
Arkansas	68	76	5.3	6.1
California	376	376	2.2	2.2
Colorado	81	77	3.0	2.8
Connecticut	28	35	1.6	1.9
Delaware	12	10	2.6	2.4
District of Columbia	5	13	1.4	3.4
Florida	309	299	3.6	3.3
Georgia	171	194	3.9	4.1
Hawaii	29	20	2.4	2.2
Idaho	30	37	4.1	4.8
Illinois	171	163	2.9	2.8
Indiana	137	138	4.5	4.5
Iowa	76	72	4.8	4.7
Kansas	74	72	5.2	5.2
Kentucky	92	70	5.0	3.8
Louisiana	95	117	5.0	6.3
Maine	18	18	2.4	2.7
Maryland	92	87	3.2	3.0
Massachusetts	109	108	3.3	3.2
Michigan	162	153	3.5	3.4
Minnesota	92	101	3.4	3.5
Mississippi	71	90	6.3	6.2
Missouri	124	125	4.3	4.4
Montana	38	32	7.9	6.9
Nebraska	60	35	6.3	3.6
Nevada	54	32	4.2	2.4
New Hampshire	22	11	3.2	1.6
New Jersey	101	69	2.4	1.6
New Mexico	41	44	4.9	4.7
New York (including N.Y.C.)	272	313	3.1	3.5
New York City	56	87	1.5	2.3
North Carolina	174	183	3.7	3.9
North Dakota	28	38	7.0	10.1
Ohio	164	174	3.1	3.3
Oklahoma	92	91	5.6	5.5
Oregon	72	60	3.9	3.2
Pennsylvania	163	172	2.8	3.0
Rhode Island	9	8	1.8	1.6
South Carolina	96	88	4.4	4.2
South Dakota	31	30	7.5	7.3
Tennessee	122	128	4.3	4.4
Texas	545	534	4.4	4.3
Utah	44	43	3.2	2.9
Vermont	10	22	3.2	7.0
Virginia	153	118	4.0	2.9
Washington	78	84	2.4	2.5
West Virginia	47	51	6.6	7.4
Wisconsin	105	106	3.6	3.5
Wyoming	34	20	12.3	7.7

<sup>1</sup> Fatal injury rates are per 100,000 full-time equivalent workers (FTEs). Fatal injury rates exclude workers under the age of 16 years, volunteers, and resident military. Complete national rates can be found at [www.bls.gov/iif/oshcfoi1.htm#rates](http://www.bls.gov/iif/oshcfoi1.htm#rates). Complete state rates can be found at [www.bls.gov/iif/oshstate.htm](http://www.bls.gov/iif/oshstate.htm). National and state rates are calculated using different methodology and cannot be directly compared. Please see [www.bls.gov/iif/oshfaq1.htm#q16](http://www.bls.gov/iif/oshfaq1.htm#q16) for more information on how rates are calculated and caveats for comparison. N/A means a rate was not published for this group.

<sup>2</sup> The Census of Fatal Occupational Injuries (CFOI) has published data on fatal occupational injuries for the United States since 1992. During this time, the classification systems and definitions of many data elements have changed. Please see the CFOI Definitions page ([www.bls.gov/iif/oshcfoi1.htm](http://www.bls.gov/iif/oshcfoi1.htm)) for a more detailed description of each data element and their definitions.

Note: Data for all years are final. CFOI fatal injury counts exclude illness-related deaths unless precipitated by an injury event. Margin of error is not available for state rate data.

Source: U.S. Bureau of Labor Statistics, Current Population Survey, Local Area Unemployment Statistics, Census of Fatal Occupational Injuries

## **APPENDIX D**

# A STUTE OBSERVATION: RE-EXAMINING WASHINGTON'S ENFORCEMENT OF WORKPLACE SAFETY REGULATIONS

Ben Moore\*

*Abstract:* In 1973, the Washington State Legislature enacted the Washington Industrial Safety and Health Act. The stated purpose of the Act was to ensure safe working conditions for the working men and women of Washington. Seventeen years later, the Washington State Supreme Court held that general contractors are per se liable for the WISHA violations of their subcontractors. However, the Washington Department of Labor and Industries has adopted a policy of citing general contractors for subcontractor violations only in limited circumstances. This Comment first outlines the development of worker safety laws in Washington, then examines the effects of the Department's policy at both the administrative and appellate level. Finally, this Comment argues that the Department's policy is contrary to the governing law and should be altered to be in line with the law, avoid potential confusion on appeal, and fulfill the purpose of WISHA: to protect Washington's workers.

## INTRODUCTION

In December 2016, approximately 193,000 people in Washington worked on a construction site.<sup>1</sup> Over the course of that year, 14 fatal<sup>2</sup> and 9,400 non-fatal injuries<sup>3</sup> occurred on those sites. The incident rate for non-fatal injuries on Washington construction sites in 2016 was 6.4 per 100

---

\* J.D. Candidate, University of Washington School of Law, Class of 2019. I would like to thank all the members of the *Washington Law Review* editorial staff. Without their camaraderie, dedication, and incisive edits, this Comment would not have been possible. I have previously interned with the Washington State Attorney General's Office, Division of Labor and Industries, where I worked on research surrounding WISHA violations. All opinions in this piece are my own and should not be construed to reflect the opinion of anyone in that Division.

1. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, ECONOMY AT GLANCE: WASHINGTON (Feb. 22, 2018), [https://data.bls.gov/timeseries/SMS53000002000000001?amp%253bdata\\_tool=XGtable&output\\_view=data&include\\_graphs=true](https://data.bls.gov/timeseries/SMS53000002000000001?amp%253bdata_tool=XGtable&output_view=data&include_graphs=true) [https://perma.cc/MR8R-W6KA].

2. WASH. DEP'T OF LABOR & INDUS., 2016 WASHINGTON STATE CENSUS OF FATAL OCCUPATIONAL INJURIES (CFOI), (2017), <http://www.lni.wa.gov/ClaimsIns/Files/DataStatistics/blsi/FATAL2016CFOIWA.pdf> [https://perma.cc/3F3S-SAEJ].

3. WASH. DEP'T OF LABOR & INDUS., INCIDENT RATES OF NONFATAL OCCUPATIONAL INJURIES AND ILLNESSES BY SELECTED INDUSTRIES AND CASE TYPES (2017), <http://www.lni.wa.gov/ClaimsIns/Files/DataStatistics/blsi/NONFATAL2016WASummary.pdf> [https://perma.cc/U4RH-8N2F].

3. *Washington State Supreme Court Further Muddies the Waters Between Multi-Employer Worksite Doctrine and Stute Liability*

Recently, in July 2018, the Washington State Supreme Court issued a new opinion in *Afoa v. Port of Seattle*.<sup>151</sup> Although the issue before the Court was the imposition of joint and several liability against the defendant,<sup>152</sup> the opinion contains language that may further muddy the distinction between tort and WISHA liability. In the case, the jury had “apportioned fault” between the plaintiff, the Port of Seattle, and several airlines, and the plaintiff argued that the Port was vicariously liable for the airlines portion of the damages award.<sup>153</sup>

In discussing whether the Port was jointly and severally liable for the actions of the airlines, the majority stated that “[u]nder some circumstances, jobsite owners may have a duty of care analogous to that of an employer or general contractor. A jobsite owner or general contractor will have this duty only if it maintains a sufficient degree of control over the work.”<sup>154</sup>

It is possible that this statement, that both jobsite owners’ and general contractors’ duties are tied to the amount of control retained, could impact the general contractor WISHA liability described in *Stute*.<sup>155</sup> But this statement comes in a discussion of vicarious tort liability potentially imposed on a jobsite owner, rather than in a discussion of general contractor or jobsite owner liability for WISHA violations (the majority notably never references *Stute*).<sup>156</sup> While the effects of this decision on general contractor tort liability are beyond the scope of this Comment, it is unlikely that the decision displaced the rule announced in *Stute* that general contractors are per se liable for the WISHA violations of their subcontractors.<sup>157</sup>

---

151. *Afoa v. Port of Seattle (Afoa II)*, No. 94525-0 (Wash. July 19, 2018).

152. *Id.*, slip op. at 1.

153. *Id.*

154. *Id.*, slip op. at 9 (internal citations omitted).

155. *Id.*, slip op. at -2- (Stephens, J., dissenting) (noting that the Court’s vicarious liability ruling will “dramatically change the law and to eviscerate the protections for workers at multiemployer work sites recognized under the Washington Industrial Safety and Health Act”).

156. *Id.*, slip op. at 9–13 (majority opinion) (discussing the nondelegable duty to provide a safe workplace in relation to Washington’s tort liability statutory scheme).

157. See *id.*, slip op. at -12- (Stephens, J., dissenting) (“[A] violation of WISHA by a subcontractor is not only chargeable to the subcontractor but also chargeable to a general contractor—‘the primary employer,’ whose supervisory authority puts it ‘in the best position to ensure compliance with safety regulations.’” (citing *Stute v. P.B.M.C., Inc.*, 114 Wash. 2d 454, 463, 788 P.2d 545, 550 (1990); *Millican v. N.A. Degerstrom, Inc.*, 177 Wash. App. 881, 893, 313 P.3d 1215, 1221 (Wash. Ct. App. 2013))).



# HAGLUND KELLEY LLP

May 13, 2019 - 3:52 PM

## Transmittal Information

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 96527-7  
**Appellate Court Case Title:** Gildardo Crisostomo Vargas, et al. v. Inland Washington, LLC, et al.  
**Superior Court Case Number:** 13-2-32219-6

### The following documents have been uploaded:

- 965277\_Briefs\_20190513154556SC926615\_8417.pdf  
This File Contains:  
Briefs - Amicus Curiae  
*The Original File Name was Amicus Curiae Brief with Appendix.pdf*
- 965277\_Motion\_20190513154556SC926615\_4570.pdf  
This File Contains:  
Motion 2 - Amicus Curiae Brief  
*The Original File Name was Motion for Leave to File Brief of Amicus Curiae.pdf*
- 965277\_Motion\_20190513154556SC926615\_5071.pdf  
This File Contains:  
Motion 1 - Other  
*The Original File Name was Motion for Limited Admission Pursuant to APR 8b and Order.pdf*

### A copy of the uploaded files will be sent to:

- SGW@Leesmart.com
- anas@atg.wa.gov
- atodd@hk-law.com
- bob@christielawgroup.com
- dchawes@pregodonnell.com
- derek@bishoplegal.com
- hannahatlaw@gmail.com
- hansen@aiken.com
- hselles@freedomfoundation.com
- hvanburen@pregodonnell.com
- iglitzin@workerlaw.com
- jacksonm@biaw.com
- jbutler@pregodonnell.com
- jwmaynard2003@yahoo.com
- ken@appeal-law.com
- mallen@pregodonnell.com
- margarita@bishoplegal.com
- mmalmsheimer@hk-law.com
- mmunson@pregodonnell.com
- paralegal@appeal-law.com
- ray@bishoplegal.com
- stefanie@christielawgroup.com
- tara@bishoplegal.com
- tom@christielawgroup.com
- vf@leesmart.com

- woodward@workerlaw.com

## Comments:

---

Sender Name: Anna Todd - Email: atodd@hk-law.com

**Filing on Behalf of:** Joshua J Stellmon - Email: jstellmon@hk-law.com (Alternate Email: )

Address:

200 SW Market Street, Suite 1777

Portland, OR, 97201

Phone: (503) 225-0777

**Note: The Filing Id is 20190513154556SC926615**